

Calendar No. 1375

77TH CONGRESS }
2d Session }

SENATE

{ REPORT
{ No. 1333

L. W. MAREK, JR.

MAY 14, 1942.—Ordered to be printed

Mr. STEWART, from the Committee on Claims, submitted the following

R E P O R T

[To accompany H. R. 2646]

The Committee on Claims, to whom was referred the bill (H. R. 2646) for the relief of L. W. Marek, Jr., having considered the same, report favorably thereon with the recommendation that the bill do pass with the following amendment:

On page 1, line 6, strike out the figures "\$3,500" and insert "\$4,500".

The facts are fully set forth in House Report No. 202, Seventy-seventh Congress, first session, which is appended hereto and made a part of this report.

[H. Rept. No. 202, 77th Cong., 1st sess.]

The Committee on Claims, to whom was referred the bill (H. R. 2646) for the relief of L. W. Marek, Jr., having considered the same, report favorably thereon with amendments and recommend that the bill, as amended, do pass.

The amendments are as follows:

Page 1, line 6, strike out the figures "\$5,000" and insert in lieu thereof "\$3,500".

Page 1, line 9, after the word "negligent" strike out "act of an employee of the United States of America while said L. W. Marek, Junior, was likewise employed and working at a gravel pit about four miles south of Pettibone, Texas," and insert in lieu thereof "operation of a tractor in the service of Works Progress Administration Work Project Numbered 2485, Milam County, Texas,".

An identical bill was reported favorably by this committee in the Seventy-sixth Congress, was placed on the Private Calendar where it received two objections and was recommitted to your committee.

Your committee held further hearings on the bill and reported same out in the third omnibus bill which was not considered before final adjournment.

The facts are fully set forth in House Report No. 1137, Seventy-sixth Congress, first session, which is appended hereto and made a part of this report.

[H. Rept. No. 1137, 76th Cong., 1st sess.]

The purpose of the proposed legislation is to pay the sum of \$3,500 to L. W. Marek, Jr., in full settlement of his claim against the United States for personal injuries sustained by him as a result of the negligent operation of a tractor in the service of Works Progress Administration work project No. 2485, Milam County, Tex., on March 6, 1936.

STATEMENT OF FACTS

The claimant, Lee Marek, Jr., was employed as a truck driver on a Works Progress Administration project near Cameron, Tex., as a result of his father's having been awarded a contract for the rental of one 1935 Ford truck, including the services of an operator for use on said project. Mr. Marek, Sr., had furnished his son as the operator of the truck.

The Works Progress Administration project involved was a gravel-pit project, and on March 6, 1936, Marek, Jr., had driven his truck up to the pit just after they had been blasting. He was waiting at the edge of the pit, when the foreman of the project, Mr. Vernon Fontaine, told him to drive down into the pit for loading. He did this, and while his truck was being loaded, upon instructions by the foremen, he got out of the truck.

At this time a Mr. Guy Carroll, who was a tractor driver, was engaged in loosening a big rock at the bottom of the pit. In order to do this, Carroll fastened one end of a steel cable to the tractor and wrapped the other end around the truck. At the end of the cable, which was wrapped around the rock, was a hook, which hook was fastened to the cable with two bolts. Carroll failed to tighten these bolts, so that when he put a strain on the cable by moving the tractor the end of the cable slipped out of the hook, and the hook flew wild, striking Marek, Jr., on his left leg.

There is some dispute in the records as to Carroll's actual status of employment at the time of the accident. It is contended by some that while he had been an employee of Milam County, his tractor and his services were at the time of the accident under lease to the Works Progress Administration project and that the county was being credited by the Works Progress Administration for his services and that of his tractor. However, another contention is that Carroll had been, and was at the time of the accident, an employee of Milam County, and that no reimbursement was ever made to the county by the Works Progress Administration for his services, the tractor and services being furnished to the project by the county as part of its contribution.

Your committee is of the opinion that the question of who was actually paying for the services of Carroll and the tractor at the time of the accident is immaterial, inasmuch as it is not disputed by anyone, including the Works Progress Administration and the employees on the project, that both Carroll and Marek, Jr., were under the direct supervision of the project head, Fontaine, when the accident occurred. Carroll admits that it was an oversight on his part in not tightening the bolts before attempting to start up the tractor, and Fontaine, the project supervisor, admits that it was an oversight on his part in not having previously inspected this particular part of the equipment before the work was begun. He states that he expected Carroll to attend to the matter.

Fontaine also admits that he was the sole supervisor in charge of the actual operation of the project and that everybody working at the gravel pit or around it on that particular project was under his supervision and taking orders from him. He also admits that although several employees of the project were paid by the county for their services, they, too, were under his orders, and that as superintendent of the project he could discharge or cause to be removed any or all of the employees who gave unsatisfactory service.

He further admits that at the time of the accident no one was violating any of his orders and that Marek was doing as he had been instructed to do.

In other words, the whole cause of the accident was the negligent operation of the tractor by Carroll and the negligence on the part of Supervisor Fontaine in not ascertaining that the tractor was in proper condition to be operated on his

project. As before stated, it is considered entirely immaterial whether or not Carroll was actually being paid by Works Progress Administration money or by county money. The fact remains that regardless of whose tractor he was operating or whose money he was receiving, the accident would not have occurred except for Carroll's negligence and that of the project supervisor, while both were performing on and for a Works Progress Administration project.

Marek has no claim through the Employees' Compensation Commission, inasmuch as he was working under a contract and was not an actual employee of the United States Government. Any relief for him must, therefore, be provided through the medium of a special act of Congress. He was only 21 years of age at the time of the accident, and as a result of this accident he received a broken leg and was necessitated to remain in the hospital for approximately 5 months. His left leg has been left about an inch shorter than his right, and inasmuch as he was working at the time in an effort to earn enough to continue his education at the University of Texas, his education was also handicapped. The actual expenses incurred amounted to \$2,315.25, and considerable evidence to substantiate the extent of his injuries and expenses incurred will be hereafter appended.

Your committee considers the claim just and meritorious in every respect and recommends passage of the bill.

Appended hereto are the reports of the Works Progress Administration and Employees' Compensation Commission, together with other pertinent evidence.

WORKS PROGRESS ADMINISTRATION,
Washington, D. C., April 18, 1938.

Hon. AMBROSE J. KENNEDY,
Chairman, Committee on Claims,
House of Representatives, Washington, D. C.

MY DEAR CONGRESSMAN, KENNEDY: On April 6, 1938, this Administration acknowledged receipt of your letter of April 4, 1938, enclosing a copy of H. R. 9927, a bill for the relief of L. W. Marek, Jr., and advised that our State administration had been requested to forward a complete report. The report of our State administration has been received.

The bill proposes to appropriate the sum of \$5,000 to L. W. Marek, Jr., of Cameron, Tex., "for damages sustained by said L. W. Marek, Jr., as a result of personal injuries sustained by him, occasioned by the negligent act of an employee of the United States of America, while said L. W. Marek, Jr., was likewise employed and working at a gravel pit about 4 miles south of Pettibone, Tex., on the 6th day of March 1936."

The files of this Administration disclose that Lee W. Marek, Sr., father of claimant, was awarded a contract (ER-TPS-66-8730) on February 17, 1936, for the rental of one 1935 Ford truck, 1½ yards' capacity, license No. 17395, including the services of an operator, for use on a gravel-pit project of this Administration near Cameron, Tex., which was sponsored by the county of Milam, Tex.; that the truck was not in proper operating condition, and he purchased a new truck for his son, Lee W. Marek, Jr.; and that, as his son was a minor, he signed the purchase contract for the new truck and agreed with his son for the latter to keep all rental payments received on the truck, payments on the purchase of the truck to be made in installments.

Pursuant to the agreement between the Government and the county of Milam, the latter furnished a tractor, cable, and operators as part of its contribution to the project. It appears that on March 6, 1936, at about 3:45 p. m., the tractor, being operated by an employee of the county, was pulling a large boulder from the gravel pit; that the cable was fastened around the boulder by means of a steel hook and bolts; that as the cable tightened, the hook separated from the cable and struck Lee W. Marek, Jr., who was standing approximately 15 feet from the boulder watching the operations; and that the blow caused a compound comminuted fracture to his left leg just below the knee. A recent physician's report indicates that claimant's left leg is now shorter than his right leg by 1 inch and that a pathological condition still exists.

As indicated in our letter of April 6, 1938, a claim for compensation (WP-132760) was presented to the United States Employees' Compensation Commission and disallowed on the ground that Lee W. Marek, Jr., was not an employee of the United States. Your committee may desire to request the Commission to render a report concerning the workmen's compensation aspects of the proposed legislation.

If responsibility for the accident upon the Federal Government is predicated upon negligence of employees of the United States, as contradistinguished from workmen's compensation as an incident to the relationship of employer and employee between the United States and claimant, this Administration desires to point out that no employee of the United States was involved in the accident and that the county of Milam furnished the tractor, cable, and operator. Our State administration is being advised to refer the matter to the county of Milam, Tex., for consideration by the county of its responsibility for this accident.

Accordingly, this Administration deems it necessary to recommend against enactment of the proposed legislation.

Photostatic copies of pertinent papers from the files of this Administration are enclosed.

Sincerely yours,

CORRINGTON GILL,
Assistant Administrator.

WORKS PROGRESS ADMINISTRATION,
Washington, D. C., May 24, 1938.

HON. AMBROSE J. KENNEDY,
Chairman, Committee on Claims,
House of Representatives, Washington, D. C.

MY DEAR CONGRESSMAN KENNEDY: Your records will disclose your letter of April 27, 1938, transmitting additional statements filed with your committee by the Honorable W. R. Poage Member of Congress, in connection with H. R. 9927, a bill for the relief of L. W. Marek, Jr., and requesting a further report in the matter, after review of these statements. The further investigation solicited from our State administration for Texas, concerning which I advised you under date of April 30, 1938, has been received, and I am now pleased to comply with your request.

In its report of April 18, 1938, to your committee, this Administration found that no employee of the United States had been involved in the accident in which claimant sustained his injury, and that, in addition to having furnished the tractor operator, the county of Milam, Tex., had supplied the tractor and cable. Predicated on these findings, the Administration recommended against enactment of the proposed legislation.

It appears, however, that the Administration's findings are controverted on behalf of claimant, the contention being made that Guy Carroll, tractor operator, was an employee of the Works Progress Administration on the date of the accident and that the tractor was "leased" to the Works Progress Administration. In support of this position, affidavits of R. G. Stidham, commissioner of precinct No. 2, Milam County, Tex., and Guy Carroll are submitted. In his affidavit of July 20, 1937, Mr. Stidham avers that "Mr. Guy Carroll was the driver of the tractor and is a regular employee of the county of Milam, but on the said 6th day of March 1936 and for some time prior thereto he had been loaned to the Works Progress Administration in accordance with the terms and provisions of the said above project, and the salary of the said Carroll was on the above date being paid out of funds belonging to the said above project. Mr. Carroll was engaged as a tractor operator." In his affidavit of July 20, 1937, Guy Carroll states that he had been employed by Milam County as a truck driver and tractor operator for a number of years; that immediately prior to, and on, March 6, 1936, although so employed by the county of Milam, he was "loaned" to the Works Progress Administration for work in connection with project No. 2484 (work project No. 2485, official project No. 65-66-192); that the Works Progress Administration reimbursed the county in the full amount of his salary while he was engaged in working on the project; and that while the tractor in question was owned by the county, it was under "contract" to the Works Progress Administration. In a previous affidavit, dated July 10, 1937, Mr. Carroll refers to this tractor as having been "leased" to the Works Progress Administration.

The report of George S. Morgan, State director, division of finance, Works Progress Administration for Texas, dated May 18, 1938, and supporting evidence therewith, photostatic copies of which are enclosed, in the opinion of this Administration completely and definitely refute claimant's contentions and clearly establish the facts that Guy Carroll was an employee of the county of Milam prior to, and on, March 6, 1936; that no reimbursement was ever made to the county by the Works Progress Administration for his services; and that the tractor and cable were furnished to the project by the county as part of its con-

tribution, in accordance with its undertaking in applying for the project. The attention of your committee is called in particular to the affidavit of May 14, 1938, of Conn R. Isaacs, county auditor of Milam County, Tex., who occupied the same office during the year 1936. Mr. Isaacs certifies that Turner Foster and Guy Carroll were regular employees of Milam County in 1936 and were so employed on March 6, 1936; that the "Minutes of accounts allowed" of the commissioners' court of Milam County, Tex., disclose that the salaries of these men were paid by the county of Milam out of county funds; that there is no record of reimbursement having been made to the county for the salaries paid to Foster and Carroll by any Federal agency or department; that he knows, of his own knowledge, that no such reimbursement has ever been made; that the records of Milam County do not reveal reimbursement to the county by any Federal agency or department for salaries of operators or service of tractors, trucks, and other equipment furnished by the county as part of the sponsor's contribution to Works Progress Administration projects operated in the county, and particularly in connection with Works Progress Administration work project No. 2485; and that he knows, of his own knowledge, that this has not been done.

In view of the foregoing, the report of the State director, division of finance, and upon all the evidence, this Administration is constrained to reiterate its recommendation that the proposed legislation be not enacted.

In addition to the photostatic copies of the report of the State director, division of finance, and supporting evidence therewith, I am, in accordance with your request, returning the papers forwarded with your communication of April 27, 1938.

Sincerely yours,

CORRINGTON GILL,
Assistant Administrator.

UNITED STATES EMPLOYEES' COMPENSATION COMMISSION,
Washington, April 26, 1938.

The CHAIRMAN, COMMITTEE ON CLAIMS,
House of Representatives, Washington, D. C.

DEAR MR. CHAIRMAN: The Commission has received your request for its report upon the bill (H. R. 9927) for the relief of L. W. Marek, Jr. The bill provides:

"That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any money in the Treasury not otherwise appropriated, to L. W. Marek, Junior, of Cameron, Texas, the sum of \$5,000, in full satisfaction of his claim against the United States for damages sustained by said L. W. Marek, Junior, as a result of personal injuries sustained by him, occasioned by the negligent act of an employee of the United States of America while said L. W. Marek, Junior, was like wise employed and working at a gravel pit about four miles south of Pettibone, Texas, on the 6th day of March 1936: *Provided*, That no part of the amount appropriated in this Act in excess of 10 per centum thereof shall be paid or delivered to or received by any agent or attorney on account of services rendered in connection with this claim, and the same shall be unlawful, any contract to the contrary notwithstanding. Any person violating the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined in any sum not exceeding \$1,000."

It appears from the Commission's files that Lee W. Marek, Jr., on March 6, 1936, while standing in a gravel pit near Pettibone, Tex., waiting to load his truck with gravel, was struck in the left leg by a hook which had broken loose from the cable of a tractor operated by employees of Milam County, Tex.; that as a result thereof he sustained fracture of the left leg below the knee. On July 11, 1936, the Commission received a claim form (C. A. 1) from Lee W. Marek, Jr., in which he gave notice of this injury.

The files of the Commission contain a letter dated "Austin, Tex., Apr. 9, 1936," addressed to Mrs. Espa Stanford, State compensation officer, from R. B. Latting, compensation officer, district No. 9, Works Progress Administration, Austin, Tex., which was transmitted to the Commission by a letter dated "San Antonio, Tex., July 7, 1936," and which contains the following statement:

"The injured man L. W. Marek, was not an employee of the Works Progress Administration, his status was that of independent truck contractor, and he was injured directly by equipment owned by precinct No. 2, Milam County, and operated by Milam County employees."

The file in this case also contains a copy of a contract signed by L. W. Marek, who apparently is the father of the claimant in this case, and by the deputy procurement officer for district No. 9 of the Works Progress Administration at Austin, Tex., whereby Mr. Marek agreed to furnish the Works Progress Administration at Cameron, Tex., on an hourly rental basis, one 1½-ton dump truck, with a driver. It appears from the files in this case that Lee Marek, Jr., at the time of the injury was employed as the driver of the truck furnished by his father pursuant to the latter's contract with the Works Progress Administration.

By the Emergency Relief Appropriation Act of April 8, 1935 (49 Stat. 115), the act of February 15, 1934 (48 Stat. 351), was made applicable to persons receiving from the appropriation made therein, for services rendered as employees of the United States, security payments in accordance with schedules established by the President. After careful consideration of all the evidence on file in this case the Commission determined that Lee Marek, Jr., at the time of his injury was not an employee of the Works Progress Administration but was an independent contractor, or an employee of an independent contractor, and that the benefits of the Federal employees' compensation law could, therefore, not be extended to him. The State administrator of the Works Progress Administration San Antonio, Tex., was so advised by letter dated July 21, 1936.

The proposed measure, if enacted, would apparently be a direct grant to L. W. Marek, Jr., of \$5,000, "in full satisfaction of his claim against the United States for damages sustained by" him "as a result of personal injuries sustained by him, occasioned by the negligent act of an employee of the United States of America while said L. W. Marek, Jr., was likewise employed," and would not impose any duty upon this Commission in connection with the case. It is suggested in this connection that the committee, if it desires, may be able to secure from the Works Progress Administration further information relating to the question whether Mr. Marek's injury in fact was caused by any act of an employee of that Administration, as is apparently implied by the language of the bill.

The maximum compensation authorized by the act of February 15, 1934, as amended by the act of June 29, 1937 (Public Res. No. 47, 75th Cong.), in case of injury or death of a Federal Civil Works Administration employee, is \$3,500, payable in installments not exceeding \$25 per month to June 30, 1937, and \$30 per month thereafter. The direct grant of \$5,000 proposed to be made by the bill H. R. 9927, to L. W. Marek, Jr., is \$1,500 in excess of the maximum compensation authorized by the act of February 15, 1934, and is proposed to be paid in a lump sum.

The Commission also invites the attention of the committee to the provision in the bill which would authorize as much as \$500 to be paid as an attorney's fee, which is in contrast with the strict limitation placed upon attorneys' fees by the Commission in the administration of the act of February 15, 1934. Under that act fees for legal services rendered in respect of claims are approved only in nominal sums in proportion to the services rendered. The maximum sum authorized by the bill for such fee is greatly in excess of the usual fees approved by the Commission.

In the opinion of the Commission this case is clearly outside the scope of the provisions of the act of April 8, 1935, referred to above, which authorizes the payment of compensation only to persons rendering services as employees of the United States.

Whether there are circumstances in this case which, notwithstanding the fact that the injured person does not appear to have been a civil employee of the United States at the time of his injury, might warrant such a grant as is proposed in this bill, is a matter with respect to which the Commission has no information.

In view of the foregoing, the Commission is unable to report in favor of the enactment of the bill H. R. 9927.

Very truly yours,

JEWELL W. SWOFFORD,
(Mrs.) Jewell W. Swofford,
Chairman.

STATE OF TEXAS,
County of Travis:

Before me, W. T. Williams, a notary public in and for Travis County, Tex., personally appeared O. V. Fontaine, of Travis County, Tex., who, being by me duly sworn, upon oath said:

My name is O. V. Fontaine. On March 6, 1936, I was working for the Works Progress Administration and was engaged as project superintendent of a county

road project, Cameron, Tex., Milam County, Tex., at which time the majority of the men working under my supervision were working in a gravel pit owned by a Mr. Horelica, and located about 12 miles southwest of the city of Cameron, in Milam County, Tex. As foreman of the project, I was the actual supervisor at the gravel pit. My only superiors were the area engineer and the district supervisor, but they were not actually on the ground, and therefore I was supervisor in charge of the actual operation of the project. Everybody working at this gravel pit or around on this particular project was under my supervision and taking orders from me. Although several employees on the project were paid by the county for their services, they took orders from me. As superintendent or foreman of the project, I could discharge or cause to be removed any or all of the employees who gave unsatisfactory service.

At this particular time, the majority of the men were engaged in loading 12 gravel trucks, divided into 6 crews. Among those trucks was one operated by Mr. Lee Marek, Jr. During the process of loading it was often necessary to use dynamite to loosen up gravel banks to get gravel loose enough for the loading crew. A large portion of this gravel was oversize, and in some instances huge boulders showed up, at which times it was necessary to drag these rocks from the pit by use of a caterpillar tractor and long steel cable. On this particular day it was necessary to have a tractor in the pit, dragging large rocks clear of the loose gravel. One rock being of enormous size, it was necessary for the small tractor to have to use a great deal of power to move the rock. The cable was attached to the rock by the method of a hook, which was fastened to the cable by two bolts. Making the pull, this hook was severed from the cable and flew through the air, striking Lee Marek, Jr., just below the knee on the left leg, causing a compound fracture. I picked him up and carried him to the hospital.

At the time of the injury no one was violating any of my orders. Mr. Marek was authorized to be in the gravel pit as a truck driver. He drove his truck to a place which was a safe distance from the tractor and cable and where he was told to park for loading. The equipment and its operator, Mr. Guy Carroll, was furnished and paid by the sponsor and listed on Works Progress Administration pay rolls as "Sponsor's contribution." This equipment was supposed to be in good condition. Upon investigation after the accident, I found that the tractor operator had failed to tighten the bolts holding the hook to the cable, this being an oversight on my part for not having previously inspected this particular part of the equipment, as I expected Mr. Carroll, who was a mechanic operating the tractor, to attend to that matter. All of my orders were being carried out with the exception of the negligence on the part of Mr. Carroll's inattention to the condition of the cable and hook not being properly fastened.

O. V. FONTAINE.

Sworn to and subscribed before me this 4th day of May 1939, to certify which witness my hand and seal of office.

[SEAL]

W. T. WILLIAMS, Notary Public.

EXHIBIT A

JONES PRAIRIE, TEX., July 14, 1937.

On March 6, 1937, I received a message that my boy got his leg broken. I immediately rushed to the Cameron Hospital to find him in a critical condition. The doctor told me that he thought that his leg would have to be amputated. It was not necessary for it to be removed the first day, but for 2 months the doctor thought that any time it might be necessary for it to be amputated. During this time the boy suffered day and night. He was given all kinds of drugs to ease his suffering, but the pain was so great none of them seemed to do any good. He had blood hemorrhages for the first 2 weeks and we thought sure we would lose him, due to loss of blood.

During the 4½ months he was in the hospital I had to make trips there every day, as he was in a critical condition and it was necessary for me to be there every day. It has been almost a year and a half since the accident occurred, and the boy is unable to do any kind of work as yet. He still has to make regular trips to the hospital for treatment and is still bothered with his leg a great deal. His leg has a very deep scar, three open wounds, and is about 1 inch shorter than the right leg, which makes it very hard for him to walk. There seems to be no doubt that the boy will be bothered with his leg the rest of his life, as he is continually

complaining about it hurting him. I have been told by the doctors that he will never have normal use of his leg.

Upon investigation of the injury, I found it to be pure negligence of a Works Progress Administration worker by not tightening the bolts that held a hook on a cable that was pulling the rock out of the gravel pit. The hook flew through the air and hit the boy on the left leg, just below the knee. As it was described and pointed out to me, I can see that it was no fault of the boy at all but negligence of a fellow worker.

Up until the time the boy was hurt he was in a perfectly healthy condition, strong, and full of energy. Due to the injury the boy has lost a great deal of weight and strength, and as yet he has gained but very little of it back. He is still in a pretty bad condition and suffers much with his leg.

L. W. MAREK, Sr.

Subscribed and sworn to before me this the 14th day of July, A. D. 1937.

[SEAL]

T. B. STIDHAM, *Notary Public*.

EXHIBIT B

STATE OF TEXAS,
County of Milam:

Know all men by these presents, before me, a notary public, in and for the county of Milam, State of Texas, on this day personally appeared Lee Marek, Jr., who, being by me duly sworn on oath, said:

That my name is Lee Marek, Jr. That I am 21 years of age and have lived in Milam County, Tex., all my life except the 2 years when I attended the University of Texas. I was graduated from Yoe High School in Cameron, Tex., in 1933. During the scholastic year of 1933-34 I attended Westmoreland College, in San Antonio, Tex. During the scholastic year of 1934-35 I attended the University of Texas at Austin, Tex. I helped work my way through these 2 years of college. Due to the fact that I was unable to secure work during the summer of 1935 I was unable to go to school in the fall of 1935. Some time during the month of December 1935 I obtained employment as a truck driver on a Works Progress Administration project near Cameron. I remained in this employment until the 6th day of March 1936, at which time I was injured in the following manner: I drove up to the pit just after they had been blasting. I was waiting at the edge of the pit, when Mr. Vernon Fontaine, the foreman of the project, told to me to drive down in the pit for loading, which I did. While my truck was being loaded I got out of my truck, after being told to do so by the foreman. While I was waiting to be loaded, Mr. Guy Carroll, a tractor driver, was engaged in loosening a big rock at the bottom of the pit. In order to do this he fastened one end of a steel cable to the tractor and wrapped the other end around the rock. At the end of the cable which was wrapped around the rock was a hook.

This hook was fastioned to the cable with two bolts. I found out later that Mr. Carroll had failed to tighten these bolts, so that when he put a strain on the cable by moving the tractor the end of the cable slipped out of the hook and the hook flew wild. While the hook was in the air it hit me just below the knee on the left leg. I was carried to the hospital, where I remained for over 4 months. I was then released and went home, where I stayed in bed. I later returned to the hospital and stayed for nearly a month. During all this time I suffered great physical pain and still suffer with the same. I still have the three holes in my leg that refuse to heal. My left leg is about an inch short as the result of this injury. When I suffered this injury I was working in an effort to save enough money so that I might return to school and also trying to help my family. At the time I was injured I was earning approximately \$4 a day. I am still under the constant care of a doctor, and they are still getting pieces of bone out of my leg.

I suffered this injury through no negligence on my part and as the result of an oversight on the part of Mr. Guy Carroll.

Witness my hand at Cameron, Tex., this the 10th day of July 1937.

LEE MAREK, JR.

Subscribed and sworn to before me this the 10th day of July 1937, to certify which, witness my hand and seal of office.

[SEAL]

W. R. MORRISON, *Notary Public*.

EXHIBIT B (1)

STATE OF TEXAS,
County of Milam:

Before me, a notary public in and for Milam County, Tex., on this day personally appeared Lee Marek Jr., who, being by me duly sworn on oath, said:

That a proximate result of an injury sustained by me while working on a Works Progress Administration project in Milam County, Tex., on the 6th day of March 1936, my family and I were put to the following expense other than hospital and nursing expense, to wit:

1. During 4½ months, while I was confined to the Cameron Hospital, it was necessary for either my father or mother, or both of them, to travel from our home, which is a distance of 14 miles from the said hospital, to see about me. They made this trip once a day, traveling 28 miles, and at 5 cents per mile this item amounts to \$189.

2. During 2 months of my stay in the hospital, because of my critical illness, it was necessary for my mother to stay in the hospital and eat in town, which said maintenance amounts to the following sum, without counting her room rent at the hospital, \$60, bringing the total of these incidental expenses to the sum of \$249.

Witness my hand at Cameron, Tex., this the 10th day of July 1937.

LEE MAREK, JR.

Subscribed and sworn to before me this the 10th day of July 1937, to certify which, witness my hand and seal of office.

[SEAL]

W. R. MORRISON,
Notary Public.

EXHIBIT C

STATE OF TEXAS,
County of Milam:

Before me, a notary public in and for the county of Milam, State of Texas, on this day personally appeared Guy Carroll, who, being by me duly sworn on oath, said:

That my name is Guy Carroll and that I have been employed by Milam County for a number of years as a truck and tractor driver. That on the 6th day of March 1936 I was working for Milam County, but through an arrangement with the Works Progress Administration the tractor that I was driving was leased to the said Works Progress Administration, and I was working under the supervision of the project head for that particular project. On the said 6th day of March 1936, while so working as set out above, I was confronted with the problem of dislodging a large rock from the bottom of a gravel pit. In order to attain this end I took a large steel cable, fastened one end to the tractor, and the other end was wrapped around the rock. At the end of the cable which was wrapped around the rock there was a hook fastened to the cable with two bolts. Through an oversight on my part I did not tighten these two bolts, and so when the strain was put on the cable by my starting up the tractor the cable end slipped out of seat in the hook and the hook flew wild. While the hook was still in the air it hit Lee Marek, Jr., and caused him a serious personal injury, for which he stayed in the hospital some 5 months, and from all appearances has not yet recovered.

Witness my hand this the 10th day of July 1937.

GUY CARROLL.

Subscribed and sworn to before me this the 10th day of July 1937, to certify which, witness my hand and seal of office.

[SEAL]

W. R. MORRISON, Notary Public.

EXHIBIT D

OFFICE OF CLIFFORD G. SWIFT, M. D.,
Cameron, Tex., July 12, 1937.

Mr. LEE MAREK,
Cameron, Tex.

DEAR MR. MAREK: In accordance with your request, I am submitting herewith a statement as to your present condition, following an injury on March 6, 1936. Said injury consisted of a compound, comminuted fracture of the left

tibia a hand's breadth below the patella. There was considerable destruction of the blood supply to the anterior tibialis and peroneal group of muscles, together with injury to these muscles and to the cutaneous nerve supply of the lower leg and foot. There was a tremendous amount of infection immediately following the injury. A certain amount of infection persists today, manifesting itself as an osteomyelitis and periostitis of the left tibia and fibula.

There are three open wounds in the left leg, one at the site of the fracture, one below and medial to this, and one just above the lateral malleolus. These wounds have been occasionally discharging sequestra and will undoubtedly continue to do so. The left leg measures 1 inch shorter than the right, and there is a loss of all sensation in the sole of the foot.

It is my opinion that you have a permanent injury to hour right leg. There will probably always be a certain amount of osteomyelitis, and it is doubtful if the injured nerves will recover their function.

Very truly yours,

CLIFFORD G. SWIFT,
(Clifford G. Swift, M. D.)

Subscribed and sworn to before me this the 14th day of July, A. D. 1937.

[SEAL]

G. C. MCGREGOR, *Notary Public.*

EXHIBIT E

STATE OF TEXAS,
County of Milam.

Before me, a notary public in and for Milam County, Tex., on this day personally appeared Mr. Guy Carroll, who, being by me duly sworn on oath, said:

That my name is Guy Carroll. That I have been employed by Milam County, Tex., as a truck and tractor driver for a number of years. That on the 6th day of March 1936 and immediately prior thereto I was employed by the said county of Milam but was "loaned" to the Works Progress Administration for work in connection with project No. 2484 in said county; that is, the said Works Progress Administration reimbursed the county the full amount of my salary while I was employed in connection with this project. The tractor that I was driving belonged to Milam County but was under contract to the Works Progress Administration. On the said 6th day of March 1936 and at other times while I was so "loaned" to the Works Progress Administration I was taking orders as to my work from Mr. Vernon Fontaine, the project supervisor.

GUY CARROLL.

Subscribed and sworn to before me this the 20th day of July 1937, to certify which, witness my hand and seal of office.

[SEAL]

W. R. MORRISON, *Notary Public.*

EXHIBIT F

CAMERON, TEX., July 12, 1937.

Mr. LEE MAREK,
Jones Prairie, Tex.

In account with Cameron Hospital; W. R. Newton, E. Rischar, attending physicians.

Mar. 6 to 10 and 31: To X-rays of leg (3)-----	\$30. 00
Mar. 6 to 7:	
To fracture reduced, leg splinted, wounds dressed, pressure sores treated, antiseptic irrigations given-----	50. 00
To operating room (3 times)-----	30. 00
To anaesthetics (2)-----	10. 00
To tetanus antitoxin-----	1. 75
Mar. 18: To operation (incision made in infected part of leg, irrigated, 3 rubber drains)-----	250. 00
Mar. 31: To operation (incisions made for drainage)-----	150. 00
Mar. 31: To 62 dressings and treatments-----	93. 00
Apr. 30: To 136 dressings and treatments-----	136. 00
May 31: To 59 dressings and treatments-----	85. 00
June 25: To plaster cast applied-----	15. 00
June 26: To X-rays (stereo)-----	20. 00

June 30: To 33 dressings and treatments-----	\$79. 00
July 4: To X-rays (stereos)-----	20. 00
July 11:-----	
To hospital fee from Mar. 6 to July 11-----	632. 00
To medical and surgical supplies-----	240. 50
July 31: To 18 dressings-----	36. 00
August 31: To 10 dressings-----	20. 00
September 31: To 8 dressings-----	16. 00
October 14:-----	
To X-rays (stereo)-----	20. 00
To cast-----	10. 00
October 17: To operation, abscess lanced-----	15. 00
October 20: To hospital fee from October 17 to 20-----	15. 00
October 27: To operation removing spicula of bone-----	15. 00
October 31: To 19 dressings-----	18. 00
November 30: To 6 dressings-----	12. 00
December 30: To 3 dressings-----	6. 00
January 5: To X-ray-----	10. 00
January 31: To 6 dressings-----	12. 00
February 11: To 1 dressing-----	2. 00
March 30: To 2 dressings-----	4. 00
April 23:-----	
To X-ray-----	10. 00
To hospital fee from April 23 to 25-----	10. 00
To laboratory-----	15. 00
April 30: To 3 dressings, treatment, and lancing-----	9. 00
May 30: To 10 dressings, treatment, and lancing-----	23. 00
June 30: To 5 dressings-----	10. 00
July 9: To 1-inch splinter removed from bone-----	5. 00
Total-----	2, 135. 25
To assistant surgeon-----	100. 00
To special night nurse-----	20. 00
To special day nurse-----	60. 00
Total-----	2, 315. 25

Dr. EDUARD RISCHAR.

Subscribed and sworn to before me this the 14th day of July, A. D. 1937.

[SEAL]

G. C. MCGREGOR, Notary Public.

CAMERON HOSPITAL,
Cameron, Tex., July 12, 1937.LEE WILLIAM MAREK, JR.,
Jones Prairie, Tex.:

Employed in gravel pit 4 miles south of Pettibone, on the Buckholtz-Cameron Road. Project No. 2484, Milam County, Tex.

Accident occurred in gravel pit on March 6, 1936, causing a severe fracture, with injury of blood vessels and nerves of left leg below the knee. Compound comminuted fracture of the tibia of the left leg, with infection, with loss of sensation of the foot.

Skin, fascia, bone, muscular, vascular, and nerve injury.

The fracture was reduced, splinted, surgically dressed, and cleansed, requiring daily and many irrigations for the infection and other necessary treatments, as: X-rays, casts, therapeutic light treatments, and other needed care was given.

He was seen by Dr. W. R. Newton, Sr., Cameron, Tex.; Dr. Eduard Rischar, Cameron, Tex.; Dr. H. R. Dudgeon, Waco, Tex.; Dr. C. G. Swift, Cameron, Tex.; Dr. A. S. Epperson, Cameron, Tex.

By July 11, 1936, patient was well enough to be dismissed from the hospital, with instructions to return to the hospital every other day for necessary dressings and treatments.

On October 17, 1936, it was necessary for him to return to the hospital for surgical treatment, for removal of splinters of bone, etc.

Since the date of accident he has constantly been under our care.

His leg is gradually improving, and now is able to walk without crutches or cane, but as yet he has three open wounds, which at this date will be impossible to state when they will be healed.

The tibia of the leg is somewhat deformed at the upper portion, which will be permanent. He will have loss of sensation to his lower leg to some extent, but hope that in time he will have a fairly good leg. There is a 1-inch shortening.

DR. EDWARD RISCHAR.

Subscribed and sworn to before me this the 14th day of July A. D. 1937.

[SEAL]

G. C. MCGREGOR,

Notary Public in and for Milam County, Tex.

EXHIBIT G

STATE OF TEXAS,
County of Milam:

Before me, a notary public in and for Milam County, Tex., on this day personally appeared R. G. Stidham, who being by me duly sworn, upon oath said:

My name is R. G. Stidham. I am the duly elected and qualified commissioner of precinct No. 2 of Milam County, Tex., and was such on the 6th day of March 1936. That immediately prior to the said 6th day of March 1936 the county of Milam, acting through its duly authorized officials, had leased for the purpose of extracting gravel a certain gravel pit belonging to a Mr. Horelica, which said pit was located about 12 miles southwest of the city of Cameron in said county of Milam. That there was on the Works Progress Administration, being No. 2484, and part of the said project involved the removal of gravel from the above said pit. In order to remove said gravel from said pit and move it to where it was sought to be located or placed the Works Progress Administration, acting through its project supervisor, Mr. Vernon Fontaine, entered into a contract with Mr. Lee Marek, Jr., among others, to haul said gravel in a truck belonging to said Lee Marek, Jr. The said Marek was paid by the Works Progress Administration at the rate of \$1 per hour for the services of his truck and for his services in driving said truck.

On the said 6th day of March 1936, while so employed as set out above, the said Lee Marek, Jr., was injured by a hook that slipped from a cable that was hooked to the tractor that was removing a large rock from the gravel pit. Mr. Guy Carroll was the driver of the tractor and is a regular employee of the county of Milam but on the said 6th day of March 1936 and for some time prior thereto he had been loaned to the Works Progress Administration in accordance with the terms and provisions of the said above project and the salary of the said Carroll was on the above date being paid out of funds belonging to the said above project. Mr. Carroll was engaged as a tractor operator.

R. G. STIDHAM.

Subscribed and sworn to before me this the 20th day of July 1937, to certify which witness my hand and seal of office.

[SEAL]

G. C. MCGREGOR,

Notary Public in and for Milam County, Tex.

EXHIBIT H

JONES PRAIRIE, TEX., July 14, 1937.

MR. LEE MAREK, JR.,
Cameron, Tex.

DEAR MR. MAREK: In accordance with your request, I am submitting herewith a statement how your accident and injury occurred. On the 6th day of March I was hauling gravel at the same Works Progress Administration project that Mr. Marek was injured and recall very distinctly how it all occurred. Mr. Marek and I drove up to the gravel pit at the same time and we both stopped. I heard him tell Mr. Vernon Fontaine, the foreman of the project, he did not want to drive down in the gravel pit as they had just finished blasting and he didn't know if it was safe. Mr. Fontaine told him that everything was all right now and for him to go down in the put and have his truck loaded. He drove into the pit and backed up to the loose gravel and got out of his truck and was standing by it. It was a request of the foreman that all truck drivers get out of their truck while it was being loaded. At this same time Mr. Guy Carroll was trying to move a large rock from the gravel pit with a tractor. In order to do this he took a long cable and hooked one end of it to his tractor and on the other end he put a large hook. He then put it around the rock. When Mr. Carroll tried to pull this rock

with the tractor the hook slipped from the cable and flew in the air and hit Lee Marek's left leg. The minute we all saw him fall we rushed over to him to find his leg badly broken and crushed and he was losing an immense amount of blood. We rushed him to the Cameron Hospital where he remained for about 5 months. During this time I was a regular visitor to him and know he suffered very much the whole time he was there. It has been about 1½ years since the accident occurred and Mr. Marek is not getting along very well yet.

As I saw the accident it was no fault of Lee's, as he was just trying to make a living, but pure negligence of Mr. Carroll by not tightening the bolts that were supposed to hold the hook.

R. V. LESTER.

Subscribed and sworn to before me this the 14th day of July, A. D. 1937.

[SEAL]

F. B. STIDHAM,

Notary Public in and for Milam County, Tex.

STATE OF TEXAS,
County of Milam:

Before me, a notary public in and for Milam County, Tex., on this day personally appeared Walter H. Fuchs, who being by me duly sworn, upon oath said:

My name is Walter H. Fuchs. I was duly elected and qualified commissioner of precinct No. 1 of Milam County, Tex., and was such on the 6th day of March 1936. That immediately prior to the said 6th day of March 1936 the county of Milam, acting through its duly authorized officials, had leased for the purpose of extracting gravel a certain gravel pit belonging to a Mr. Horelica which said pit was located about 12 miles southwest of the city of Cameron in said county of Milam. That there was on the Works Progress Administration, being No. 2484, and part of the said project involved the removal of gravel from the above said pit. In order to remove said gravel from said pit and move it to where it was sought to be located or placed the Works Progress Administration, acting through its project supervisor, Mr. Vernon Fontaine, entered into a contract with Mr. Lee Marek, among others, to haul said gravel in a truck belonging to said Lee Marek. The said Marek was paid by the Works Progress Administration at the rate of \$1 per hour for the services of his truck and for his services in driving said truck.

On the said 6th day of March 1936, while so employed as set out above, the said Lee Marek, Jr., was injured by a hook that slipped from a cable that was hooked to the tractor that was removing a large rock from the gravel pit. Mr. Guy Carroll was the driver of the tractor and is a regular employee of the county of Milam but on the said 6th day of March 1936, and for some time prior thereto, Mr. Carroll was taking orders from the above said Fontaine, project supervisor, who was being paid by the Works Progress Administration. The said Mr. Carroll was not receiving cash money from the Works Progress Administration but the county of Milam was receiving \$3 per hour credit on their contributions, as set out in Works Progress Administration Form 301, for the services Mr. Carroll was rendering.

WALTER H. FUCHS.

Subscribed and sworn to before me this the 3d day of May 1939, to certify which witness my hand and seal of office.

[SEAL]

DOROTHEA KUHECKA,

Notary public in and for Milam County.

STATE OF TEXAS,
County of Milam:

Before me, a notary public in and for Milam County, Tex., on this day personally appeared R. S. Cloud, who being by me duly sworn, upon oath said:

My name is R. S. Cloud. I was the duly elected and qualified commissioner of Precinct No. 3 of Milam County, Tex., and was such on the 6th day of March 1936. That immediately prior to the said 6th day of March 1936 the county of Milam, acting through its duly authorized officials, had leased for the purpose of extracting gravel a certain gravel pit belonging to a Mr. Horelica, which said pit was located about 12 miles southwest of the city of Cameron in said county of Milam. That there was on the Works Progress Administration, being No. 2484, and part of the said project involved the removal of gravel from the above said pit. In order to remove said gravel from said pit and move it to where it was

sought to be located or placed, the Works Progress Administration, acting through its project supervisor, Mr. Vernon Fontaine, entered into a contract with Mr. Lee Marek, among others, to haul said gravel in a truck belonging to said Lee Marek. The said Marek was paid by the Works Progress Administration at the rate of \$1 per hour for the services of his truck and for his services in driving said truck.

On the said 6th day of March 1936, while so employed as set out above, the said Lee Marek, Jr., was injured by a hook that slipped from a cable that was hooked to the tractor that was removing a large rock from the gravel pit. Mr. Guy Carroll was the driver of the tractor and is a regular employee of the county of Milam, but on the said 6th day of March 1936, and for some time prior thereto, Mr. Carroll was taking orders from the above said Fontaine, project supervisor, who was being paid by the Works Progress Administration. The said Mr. Carroll was not receiving cash money from the Works Progress Administration but the county of Milam was receiving \$3 per hour credit on their contributions for the services Mr. Carroll was rendering.

R. S. CLOUD.

Subscribed and sworn to before me this the 3d day of May 1939, to certify which witness my hand and seal of office.

[SEAL]

W. E. GAITHER,

Notary Public in and for Milam County, Tex.

THE STATE OF TEXAS,
County of Milam, ss:

Before me, a notary public in and for Milam County, Tex., on this day personally appeared E. G. Stiles, who being by me duly sworn, upon oath said:

My name is E. G. Stiles. I am duly elected and qualified commissioner of precinct No. 4 of Milam County, Tex., and was such on the 6th day of March 1936. That immediately prior to the said 6th day of March 1936 the County of Milam, acting through its duly authorized officials, had leased for the purpose of extracting gravel a certain gravel pit belonging to a Mr. Horelica, which said pit was located about 12 miles southwest of the city of Cameron in said county of Milam. That there was on the Works Progress Administration, being No. 2484, and part of the said project involved the removal of gravel from the above said pit. In order to remove said gravel from said pit and move it to where it was sought to be located or placed the Works Progress Administration, acting through its project supervisor, Mr. Vernon Fontaine, entered into a contract with Mr. Lee Marek among others to haul said gravel in a truck belonging to said Lee Marek. The said Marek was paid by the Works Progress Administration at the rate of \$1 per hour for the services of his truck and for his services in driving said truck.

On the said 6th day of March 1936 while so employed as set out above the said Lee Marek, Jr., was injured by a hook that slipped from a cable that was hooked to the tractor that was removing a large rock from the gravel pit. Mr. Guy Carroll was the driver of the tractor and is a regular employee of the county of Milam, but on the said 6th day of March 1936, and for some time prior thereto, Mr. Carroll was taking orders from the above said Fontaine, project supervisor, who was being paid by the Works Progress Administration. The said Mr. Carroll was not receiving cash money from the Works Progress Administration, but the county of Milam was receiving \$3 per hour credit on their contributions, as set out in Works Progress Administration Form 301, for the services Mr. Carroll was rendering.

E. G. STILES.

Subscribed and sworn to before me this the 3d day of May 1939 to certify which witness may hand and seal of office.

[SEAL]

W. D. DURCEK, *Notary Public.*

BRIEF OF LAW IN CLAIM OF LEE MAREK, JR., AGAINST WORKS PROGRESS ADMINISTRATION AND THE UNITED STATES GOVERNMENT

Question. Was Guy Carroll, caterpillar tractor operator, an employee of the Government, or the Works Progress Administration, at the time Lee Marek, Jr., received injuries complained of?

Statement of facts: Guy Carroll states that although he was a general employee of the county of Milam, he was loaned through an arrangement with the county

and Works Progress Administration officials to the Works Progress Administration to operate a caterpillar tractor on March 6, 1936, in a gravel pit. He was working under the supervision of the project head of that particular project. County commissioners of the county and the county judge state that Carroll was loaned to the Works Progress Administration through arrangements made with the Works Progress Administration and that they received credit on the contribution they were required to make under the contract for furnishing the caterpillar tractor and its operator. The project superintendent at this particular job states that Carroll was one of several employees furnished by the county, but Carroll took orders from him. He states that he was fully in charge of the project and that the project was a Works Progress Administration project. He states that he could discharge or cause to be removed all employees, including Carroll.

Decisions: In the case of *Norfolk & W. Ry. Co. v. Hall* (57 F. (2d) 1003), it is held that Hall was injured by the fall of an iron stanchion in a railway storage mail car and brought suit against the Norfolk & Western Railway Co. and also against the American Railway Express Co. He was employed and paid by the express company as an express messenger, a position which he had held for more than 3 years; but he was furnished by the express company to the railway company, which reimbursed the former for his entire salary. He was in turn furnished by the railway company to the United States to assist in the transportation of the mails. The railway company also furnished to the United States a storage mail car to carry mail between Cincinnati, Ohio, and Norfolk, Va. Hall's duties required him to ride on the car from Bluefield, W. Va., to Norfolk, taking on and discharging mail, and making the necessary separations of the mail en route.

The railway company had no contract with the United States for the transportation of the mails. It furnished the cars and the men to handle the mail, in conformity with the act of Congress (39 U. S. C. 541 (39 U. S. C. A. 541)), and the regulations promulgated under its authority. The railway company had no power or authority over Hall in the handling of the mails. He himself testified at the second trial that, during the 3 years of his employment, he received no directions from the railway company and made no report to it. The United States directed and controlled the men who handled the mail in the railway company's cars under the following regulation of the Postmaster General, which seemed significant to the Supreme Court in *Denton v. Yazoo & Miss. Valley R. Co.*

And held that a railway company is not responsible for an injury caused by the negligence of a porter in its general service who, at the time of the injury, was engaged in loading a United States mail car under the direction of a United States postal transfer clerk. The court said: "When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former. This rule is elementary and finds support in a large number of decisions."

Assuming the facts recited to be correct, it follows that the United States and not the railway company was the master of Hall at the time of his injury, and that the former, and not the latter, owed him the duties pertinent to that relationship. A servant furnished by his general employer to perform a particular service for another under the latter's control is to be dealt with as the servant of the latter and not of the former. The special employer bears, not only the liability to third persons for injuries caused by the servant's negligence, but also the liability to the servant for injuries suffered by him from the neglect to perform the duties owed him by his master. *Samuelian v. American Tool & Machine Co.* (168 Mass. 12, 46 N. E. 98); *Wyman v. Berry* (106 Me. 43, 75 A. 123, 20 Ann. Cas. 439); *Thomas v. Great Western Mining Co.* (150 Okl. 212, 1 P. (2d) 165); *Channon v. Sanford Co.* (70 Conn. 573, 40 A. 462, 41 L. R. A. 200, 66 Am. St. Rep. 133); *Wolfe v. Mosler Safe Co.* (139 App. Div. 848, 124 N. Y. S. 541). This rule applies when the general employer furnishes, not only the servant, but the appliances with which he works, if both are subject to the control of the special employer. *Hardy v. Shedden Co.* ((C. C. A.) 78 F. 610, 37 L. R. A. 33); *Woodward Iron Co. v. Limbaugh* ((C. C. A.) 276 F. 1); *Linstead v. Ches. & Ohio Ry. Co.* (276 U. S. 28, 48 S. Ct. 241, 72 L. Ed. 453); *Sacker v. Waddell* (98 Md. 43, 56 A. 399, 103 Am. St. Rep. 374); *Coughlan v. Cambridge* (166 Mass. 268, 44 N. E. 218); *Scribner's Case* (231 Mass. 133, 120 N. E. 350, 3 A. L. R. 1178); *Brown v. Smith* (86 Ga. 274, 12 S. E. 411, 22 Am. St. Rep. 456); *Miller v. North Hudson Con. Co.* (166 App. Div. 348, 152 N. Y. S. 22); *Green v. McMullen, Snare & Triest* (177 App. Div. 771, 164 N. Y. S. 948).

We are further of opinion that "this case comes within the class of cases of which *Nason's Adm'r v. Railroad Co.* (22 U. S. App. 220, 9 C. C. A. 666, and 61 Fed. 605) is one. In that case a railroad company had rented to a bridge company its engine, its engineer, and its fireman, and while it was doing the business of the bridge company, the plaintiff was injured through the negligence of the engineer. It was held that the railroad company, the owner of the engine and the original employer of the engineer, could not be held liable for the injury, because though the engineer was the general servant of the railroad company, at the time he was engaged in the business of the bridge company. A number of cases were cited to sustain this view. *Donovan v. Construction Syndicate* (1893) 1 Q. B. 629; *Rourke v. Colliery Co.* (2 C. P. Div. 205); *Powell v. Construction Co.* (88 Tenn. 692, 13 S. W. 691); *Miller v. Railway Co.* (76 Iowa, 655, 39 N. W. 188). But the present, we think, is clearly distinguishable from such a case, because here was not the ordinary hiring of a carriage for a trip, but it was the hiring of a truck to be built upon, so that its nature as a vehicle was changed, and then a separate hiring of the means of locomotion. This did, in our opinion, place the drivers under the control of the executive committee of the Grand Army post, and made that post, for the time being, the master of the driver. To it, therefore, must the driver look for indemnity for any injury suffered by him through the negligence of the post in altering and loading the truck. The judgment of the circuit court is affirmed."

In the case of *McLamb v. E. I. Du Pont de Nemours & Co.* (79 F. (2d) 966), it is held that the engineer sought and obtained the advice of the Du Pont Co. as to whether explosives should be used; but the final decision in the matter was made by him. Likewise, the instruction and direction of the men in the use of the dangerous substance was left to the experts; but the control of the undertaking was never relinquished by the United States. The engineer at any time could have withdrawn the laborers and abandoned the use of explosives, or could have changed the methods employed. The fact that he refrained from interfering does not indicate a lack of power on his part.

The determining factors here are that the work was the work of the United States, and that control over it was never relinquished by the Army engineer in charge. As was said in *Singer Mfg. Co. v. Rahn* (132 U. S. 518, 523, 10 S. Ct. 175, 176, 33 L. Ed. 440): "The relation of master and servant exists whenever the employer retains the right to direct the manner in which the business shall be done, as well as the result to be accomplished, or in other words, 'not only what shall be done, but how it shall be done.'"

To determine whether a given case falls within the one class or the other we must inquire whose is the work being performed—a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation, where the work furnished is part of a larger undertaking.

The facts of the case constitute a clear example of the sort often before the courts in which one person puts his servant at the disposal of another for the performance of a particular service for the latter, whereupon the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter, and not the former, so that the latter, and not the former, is liable for the servant's torts. See *Linstead v. Chesapeake & O. Ry. Co.* (276 U. S. 28, 48 S. Ct. 241, 72 L. Ed. 453); *Denton v. Yazoo & M. V. R. Co.* (284 U. S. 305, 52 S. Ct. 141, 76 L. Ed. 310); *Norfolk & W. Ry. Co. v. Hall* ((C. C. A.) 57 F. (2d) 1004).

In the case of *Jones v. George F. Getty Oil Co.* (92 F. (2d) 255), the Court held that the controlling factor is: For whom is the work being performed, and who had the power to control the work and the employee? The authority to determine the work to be done, and the manner in which it is to be carried on, necessarily includes the right to suspend or terminate the work altogether or, possibly, to exclude the particular employee from the job, not including the right to discharge the employee from the service of his general employer (Norwood), nor need it include the actual giving of directions to the employee in connection with the work he is doing.

In *Linstead v. C. & O. R. Co.* (276 U. S. 28, 48 S. Ct. 241, 243, 72 L. ed. 453), the Court held: "Now the work which was being done here by Linstead and his crew was the work of the Chesapeake & Ohio Railway. It was the transportation of cars, loaded and empty, on the Chesapeake & Ohio Railway between Stevens and Cincinnati. It was work for which the Chesapeake & Ohio road was paid according to the tariff approved by the Interstate Commerce Commission; it was work done under the rules adopted by the Chesapeake & Ohio Railway Co.; and it was done under the immediate supervision and direction of the trainmaster

in charge of the trains running from Stevens to Cincinnati, and that trainmaster was a superior employee of the Chesapeake & Ohio road. We do not think that the fact that the Big Four road paid the wages of Linstead and his crew, or that they could only be discharged or suspended by the Big Four, prevented their being the servants of the Chesapeake & Ohio Co. for the performance of this particular job."

As in the instant case, the Chesapeake & Ohio had no power to suspend or discharge the employee in question, but the Court held that fact to be immaterial. The Court points out that the work was done under the rules adopted by the defendant railroad company and under the supervision of its trainmaster.

In *Higgins v. Western Union Telegraph Co.* (50 N. E. 500), defendant employed a contractor to make repairs to a building belonging to it, and, among other things, to put in elevators. After the elevators had been put in, but before they were turned over to the defendant, though used by it at certain times, the contractor procured a man, who was in the general employ of the defendant, to run the elevators while used in carrying materials, and for other purposes about the work in progress. This operator's negligence caused injury to plaintiff. Held that such man, though in the general employment of defendant, was not for this purpose its servant, but the servant of the contractor, and defendant was not responsible for his negligence. And a servant employed and paid by one person may nevertheless be, ad hoc, the servant of another in a particular transaction even when the general employer is interested in the work.



